A

Perak Integrated Network Services Sdn Bhd v Urban Domain Sdn Bhd (suing on behalf of PINS OSC & Maintenance Services Sdn Bhd vide derivative action) & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-2442–11 OF 2013
MOHAMAD ZABIDIN, AZIZAH NAWAWI AND DARRYL GOON JJCA
C 21 JUNE 2021

Contract — Construction of terms of contract — Plain and ordinary meaning — Whether holistic reading of contemporaneous documents showed that the relevant provisions were clear and left little room for doubt — Whether trial judge correctly held that joint-venture company ('JVCo') was entitled to be paid maintenance fees from revenue derived from all telecommunication providers without distinction — Whether payment of maintenance fees to JVCo could not be forfeited just because it had allegedly committed a breach of contract — Whether if innocent party was so affected by the alleged breach, it should have terminated the contract and sued for damages, but it did not — Whether until terminated the terms of the contract between the parties had to be given their full effect

D

E

F

The Malaysian Communications and Multimedia Commission ('MCMC') had granted the appellant a network facilities provider licence which entitled it to provide network facilities to telecommunication providers. The appellant then entered into a licence agreement with three major telecommunication providers, Maxis, Celcom and Digi ('the Group A operators'), who, in return for payment of a licence fee to the appellant, were allowed to use land sites and other telecommunication infrastructure provided by the appellant. The infrastructure facilities were not exclusively for the use of the Group A operators as the licence agreement permitted other telecommunication providers to also use the same facilities on payment of rental. When the Perak State Government subsequently granted the appellant a concession to build new telecommunication towers and develop new broadcasting/broadband infrastructure in the State, the appellant entered into a joint-venture with the first respondent to form a joint-venture company (the second respondent, 'R2'), in which both parties held equal shares, to carry out the construction works under the concession agreement and to maintain, manage and lease out the completed infrastructure. R2 was also to carry out infrastructural works requested by other independent telecommunication providers. Under the terms of a management agreement and a supplemental management agreement signed between R2 and the two joint-venture partners, R2 was to be

G

H

I

paid a management fee from the revenue the appellant collected from the telecommunication providers using the infrastructure facilities. The first respondent subsequently filed a derivative action for and on behalf of R2 in the High Court claiming from the appellant maintenance fees it had not paid to R2 from revenue collected from telecommunication providers other than those in Group A (ie, the 'Group B operators'). The appellant had, in fact, for four years since the first supplemental management agreement was signed, been paying R2 management fees from revenue collected from all operators without distinction until it was legally advised not to pay R2 from the revenue collected from the Group B operators. In refuting R2's claim, the appellant counterclaimed for, inter alia, a declaration that R2 was not entitled to any payments as it had committed a fundamental breach of contract. The High Court dismissed the counterclaim and held that under the terms of the maintenance agreement and first supplemental agreement, the appellant was liable to pay maintenance fees to R2 based on 20% of the revenue it earned from both the Group A and Group B operators. The main issue in the instant appeal was whether the High Court erred in holding that R2 was entitled to be paid maintenance fees from the revenue earned from the Group B operators.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) The High Court did not err in holding that R2 was entitled to be paid maintenance fees drawn from payments made by both the Group A and Group B operators (see para 64).

(2) Clause 3.1 of the first supplemental management agreement provided that after payment of the 'priority payments', R2 was entitled to receive as maintenance fees an amount equivalent to 20% of the 'rental proceeds and other payments' for the maintenance of the telecommunication infrastructures. It was clear from cl 2.1.1 of the management agreement that 'rental proceeds' referred to rental received from the Group A operators while 'other payments' included monies received from 'other telecommunication providers' ie, those who were not in Group A. Clause 5A of the licence agreement signed between the appellant and the Group A operators showed that the parties had contemplated the infrastructure facilities under the licence agreement being shared by other operators upon similar terms. In addition, 'other infrastructures' referred to in the management agreement was defined to include infrastructure construction projects that had been commissioned by other telecommunication providers who were not in Group A. It was also significant that for four years after the first supplemental management agreement was signed, the appellant had been paying R2 maintenance fees from the revenue derived from the Group B operators without any issue until the appellant stopped doing so pursuant to a legal opinion it

had obtained from solicitors who had not studied the first supplemental management agreement. In the circumstances, R2 was entitled to be paid its fees out of revenue received from operators other than those in Group A for use of the infrastructures under the licence agreement (see paras 46–48, 52–54, 57–60, 65 & 69).

(3) Contrary to what was contended by the appellant, R2's entitlement to be paid the maintenance fees under cl 3.1 of the first supplemental management agreement was not conditional upon R2 making the 'priority payments' that it had contracted to make under cl 4.1 of the management agreement. The making of the 'priority payments' was not a condition precedent to R2's entitlement to be paid its maintenance fees. Even if R2 had committed a breach of contract as alleged, it did not ipso facto follow that its right to payment of the maintenance fees under the first supplemental management agreement would be automatically negated or forfeited — unless there was an agreed term for such a consequence, and there was none in this case (see paras 100, 70, 102, 84 and 92).

(4) If R2 had committed any breach of contract as alleged and the appellant had suffered damage as a result, it was the appellant's option to either continue with the contract or to treat it as terminated and to sue for damages. In the instant case, the appellant did not terminate the management agreement or the first supplemental management agreement. Instead, it wrongfully took over the contractual functions of R2 and rendered R2 unable to function (see paras 92, 94, 98 & 103).

[Bahasa Malaysia summary

Suruhanjaya Komunikasi dan Multimedia Malaysia ('MCMC') telah memberikan perayu lesen pemberi kemudahan rangkaian yang memberikannya hak untuk memberikan kemudahan rangkaian kepada penyedia telekomunikasi. Perayu kemudian memasuki perjanjian pelesenan dengan tiga penyedia telekomunikasi utama, Maxis, Celcom dan Digi ('pengendali Kumpulan A'), yang, sebagai balasan pembayaran fi pelesenan kepada perayu, dibenarkan menggunakan tapak dan lain-lain infrastruktur telekomunikasi yang disediakan oleh perayu. Kemudahan infrastruktur tidak hanya khusus untuk penggunaan pengendali Kumpulan A kerana perjanjian pelesenan membenarkan penyedia telekomunikasi lain untuk menggunakan kemudahan yang sama atas pembayaran sewa. Apabila Kerajaan Negeri Perak kemudiannya memberikan perayu konsesi untuk membina menara telekomunikasi baharu dan membangunkan infrastruktur penyiaran/jalur lebar baharu di Negeri tersebut, perayu memasuki usaha sama dengan responden pertama untuk membentuk syarikat usaha sama (responden kedua, 'R2'), di mana kedua-dua pihak memegang bahagian saham yang sama, untuk menjalankan kerja pembinaan berdasarkan perjanjian konsesi dan untuk mengekalkan, mengurus dan menyewakan infrastruktur yang telah siap. R2

juga menjalankan kerja infrastruktur yang diminta oleh penyedia telekomunikasi bebas yang lain. Di bawah terma-terma perjanjian pengurusan dan perjanjian pengurusan tambahan yang ditandatangani antara R2 dan dua rakan usaha sama, R2 harus dibayar fi pengurusan dari hasil yang dikumpul oleh perayu daripada penyedia telekomunikasi yang menggunakan kemudahan infrastruktur tersebut. Responden pertama kemudiannya memfailkan tindakan terbitan untuk dan bagi pihak R2 di Mahkamah Tinggi dengan menuntut dari perayu yang fi pengurusan belum dibayarnya kepada R2 atas hasil yang dikumpulkan dari penyedia telekomunikasi selain daripada yang ada dalam Kumpulan A (iaitu, pengendali 'Kumpulan B' '). Perayu, sebenarnya, selama empat tahun dari perjanjian pengurusan tambahan pertama ditandatangani, telah membayar fi pengurusan kepada R2 dari hasil yang dikumpulkan dari kesemua pengendali tanpa membezakannya sehingga dinasihatkan perundangan untuk tidak membayar R2 dari hasil yang dikumpulkan dari pengendali Kumpulan B . Dalam menolak tuntutan R2, perayu membuat tuntutan balas, antara lain, satu pengisytiharan bahawa R2 tidak berhak mendapat sebarang pembayaran kerana telah melakukan pelanggaran dasar kontrak. Mahkamah Tinggi menolak tuntutan balas tersebut dan memutuskan bahawa di bawah terma perjanjian pengurusan dan perjanjian tambahan pertama, perayu bertanggungjawab membayar fi pengurusan kepada R2 berdasarkan 20% dari hasil yang diperolehnya dari kedua-dua pengendali Kumpulan A dan Kumpulan B. Isu utama dalam rayuan semasa adalah sama ada Mahkamah Tinggi telah terkhilaf dalam memutuskan bahawa R2 berhak dibayar fi pengurusan dari hasil yang diperoleh dari pengendali Kumpulan B.

Diputuskan, dengan sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Mahkamah Tinggi tidak terkhilaf dalam memutuskan bahawa R2 berhak dibayar fi pengurusan yang diambil dari pembayaran yang dibuat oleh kedua-dua pengendali Kumpulan A dan Kumpulan B (lihat perenggan 64).

(2) Klausa 3.1 perjanjian pengurusan tambahan pertama menetapkan bahawa setelah pembayaran 'pembayaran keutamaan', R2 berhak menerima sebagai fi pengurusan dengan jumlah yang setara dengan 20% dari 'hasil sewaan dan pembayaran lain' bagi pengurusan infrastruktur telekomunikasi. Ianya jelas dari klausa 2.1.1 perjanjian pengurusan bahawa 'hasil sewaan' merujuk kepada sewa yang diterima dari pengendali Kumpulan A sementara 'pembayaran lain' termasuk wang yang diterima dari 'penyedia telekomunikasi lain' iaitu, mereka yang tidak termasuk dalam Kumpulan A. Klausa 5A perjanjian pelesenan yang ditandatangani antara perayu dan pengendali Kumpulan A menunjukkan bahawa pihak-pihak telah mempertimbangkan kemudahan infrastruktur di bawah perjanjian pelesenan untuk dikongsi

oleh pengendali lain dengan syarat yang serupa. Tambahan itu, 'infrastruktur lain' yang dirujuk dalam perjanjian pengurusan didefinisikan untuk merangkumi projek-proyek pembinaan infrastruktur yang telah diberikan oleh penyedia telekomunikasi lain yang tidak termasuk dalam Kumpulan A. Ia juga amat penting bahawa selama empat tahun setelah perjanjian pengurusan tambahan pertama ditandatangani, perayu telah membayar R2 fi pengurusan dari hasil yang diperoleh dari pengendali Kumpulan B tanpa sebarang isu sehingga perayu berhenti melakukannya berdasarkan pendapat perundangan yang diperolehnya dari peguamcara yang tidak menyemak perjanjian pengurusan tambahan pertama. Dalam keadaan tersebut, R2 berhak untuk dibayar fi dari hasil yang diterima daripada pengendali selain dari Kumpulan A atas penggunaan infrastruktur berdasarkan perjanjian pelesenan (lihat perenggan 46–48, 52–54, 57–60, 65 & 69).

(3) Bertentangan dengan apa yang didakwa oleh perayu, hak R2 untuk dibayar fi pengurusan di bawah klausa 3.1 perjanjian pengurusan tambahan pertama tidak bergantung kepada R2 dalam melakukan 'pembayaran keutamaan' yang telah dipersetujuinya untuk dibuat berdasarkan klausa 4.1 perjanjian pengurusan. Pembayaran 'pembayaran keutamaan' bukanlah syarat duluan bagi hak R2 untuk dibayar fi pengurusannya. Sekalipun R2 melakukan pelanggaran kontrak seperti yang didakwa, ia tidak secara ipso facto mengikuti bahawa haknya untuk dibayar fi pengurusan di bawah perjanjian pengurusan tambahan pertama akan secara automatik dibatalkan atau dilucutkan – melainkan sekiranya terdapat terma yang dipersetujui untuk akibat tersebut , dan tidak ada dalam kes ini (lihat perenggan 70, 84, 92, 100 & 102).

(4) Sekiranya R2 telah melakukan pelanggaran kontrak seperti yang didakwa dan perayu mengalami kerugian akibatnya, ia adalah pilihan perayu untuk meneruskan kontrak tersebut atau menganggappnya sebagai ditamatkan dan menyaman untuk ganti rugi. Dalam kes semasa, perayu tidak menamatkan perjanjian pengurusan atau perjanjian pengurusan tambahan pertama. Sebaliknya, ia telah secara salah mengambil alih fungsi kontraktual R2 dan menjadikan R2 tidak dapat berfungsi (lihat perenggan 92, 94, 98 & 103).]

Cases referred to

AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don [2012] 3 MLJ 1; [2012] 3 CLJ 551; [2012] 3 MLRA 459, FC (refd)

LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor [2007] 4 MLJ 1; [2007] 2 CLJ 434, CA (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1993] 3 CLJ 577, CA (refd)

Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd [1983] 2 MLJ 317, FC (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492; [2015] 9 CLJ 153, FC (refd)
Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd [2009] 5 MLJ 243; [2009] 1 LNS 296, HC (refd)

Legislation referred to

Communications and Multimedia Act 1998 s 242

Appeal from: Suit No 22NCC-1041–07 of 2012 (High Court, Kuala Lumpur)

M Pathmanathan (Shanti Pathmanathan, Shirin Pathmanathan and Villie Nethi with him) (Ranjit Singh & Yeoh) for the appellant.
Bastian Vendargon (S Ravenesan, Vincent Lim Seng Liang and Leong Kwong Wah with him) (Dennis Nik & Wong) for the first respondent.
Michelle Siah (Ong Kok Bin & Co) for the second respondent.

Darryl Goon JCA:

[1] This was an appeal by the appellant, the second defendant in the High Court. The appellant's appeal was only against part of the decision of the learned High Court judge.

[2] Although this appeal was limited in its scope, it is nevertheless necessary that the background to the entire dispute be disclosed to some limited extent so that not least, the context of the appeal may be appreciated.

[3] Due to the nature of the suit brought, the claims made, the counterclaim and the limited appeal, for the avoidance of confusion as to the parties, they will be referred to in their respective capacities in the suit before the High Court.

[4] It is also necessary to state at the outset, and by way of a caveat, that the decision of this court, and the grounds set out, are strictly limited to the specific issues raised in this appeal. This is because there exists another appeal out of the same suit and judgment of the High Court, and that is Civil Appeal No W-02(NCC)(W)-2434–11 of 2013 which was brought by the plaintiff.

[5] After considering both the oral and written submissions of learned counsel for the parties, the record of appeal and the supplementary documents

filed, the appeal was dismissed with costs. The reasons for doing so are herein set out. This is the judgment of the court.

THE SUIT AND THE PARTIES

[6] The suit brought in the High Court was a derivative action. The derivative action was commenced by the plaintiff, Urban Domain Sdn Bhd for the benefit and on behalf of the first defendant, PINS OSC & Maintenance Services Sdn Bhd, against the second and third defendants namely Perak Integrated Network Services Sdn Bhd (the appellant in this appeal) and one Dato' Seri Dr Abdullah Fadzil Che Wan.

[7] As is the nature of a derivative action, the causes of action and the remedies sought were in actual fact those of the first defendant levelled against the second and third defendants.

[8] From the pleadings, it appears that the plaintiff had also sought to maintain the action for and on its own behalf, though ultimately, for the purposes of this appeal, nothing turns on that.

[9] The first defendant was a joint venture company. Its shareholders were the plaintiff and the second defendant, each holding 50% of the shares in the first defendant.

[10] The third defendant was a director in both the first and the second defendants.

[11] The plaintiff's claim on behalf of the first defendant was for certain payments to be made to the first defendant by the second and the third defendants based on the terms of contracts that had been entered into by the parties.

[12] The basis of the plaintiff's claim against the third defendant was premised on alleged breaches of his fiduciary duties owed to the first defendant, as a director of the first defendant. The claim against the third defendant was dismissed. However, this appeal does not concern the third defendant.

[13] Apart from defending the claim against it in the suit, the second defendant also mounted a counterclaim against the first defendant for, inter alia, payment of a sum of RM3,224,904.10, as damages for breach of contract and a declaration that the first defendant was not entitled to any payments under any of the relevant contracts entered into between the parties.

[14] Following the trial, the learned trial judge held as follows:

(A) the second defendant is, in accordance to Clause 4.1 of the management agreement dated 21.5.2007 ('Management Agreement') and Clause 3.1 of the First Supplemental Agreement dated 27.5.2007, liable to pay to the first defendant Maintenance Fee calculated at the rate of 20% from the Rental Proceeds and Other Payments received from the Operators (Group A Operators) and Other Telecommunication Providers (Group B Operators) for the 87 Towers which was constructed and maintained by the first defendant for the period from 21.5.2007 (the management agreement date) until the expiry of the period as stated in Clause 8.1.1 of the management agreement for the Operators (Group A Operators) and the Other Telecommunication Providers (Group B Operators) which will be determined vide the Account and Inquiry in accordance to (B) below;

(B) that an Account and Inquiry be conducted on the Maintenance Fee payable by the second defendant to the 1 st Defendant in accordance to the Judgment herein before the Registrar of the High Court Kuala Lumpur;

(C) the second defendant is to file and serve to the plaintiff's solicitors, an affidavit affirming and exhibiting the second defendant's accounts together with supporting documents within 30 days from the date of this Judgment herein;

(D) the second defendant is to pay to the 1 st Defendant all sums determined to be due to the first defendant within 30 days after the Accounts and Inquiry as stated in (B) above is conducted entirely;

(E) the Maintenance Fee determined from the Account and Inquiry as stated in (B) above is subject to a deduction of the Priority Payments made by the second defendant to the Malaysia Communications and Multimedia Commission ('MCMC') in relation to the 87 towers built and maintained by the first defendant (which will be determined vide an Account and Inquiry in accordance to (B) above);

(F) interest at a rate of 5% a year from the date of the Judgment herein until the date of full settlement on the amount determined to be payable to the first defendant in accordance to the Account and Inquiry as mentioned in (B) above;

(G) save for the second defendant's counterclaim with regards to Priority Payments made by the second defendant to MCMC, the second defendant's counterclaim against the first defendant is dismissed with cost of RM50,000.00 to the plaintiff;

(H) the plaintiff's action against the third defendant is dismissed with cost of RM15,000.00 to the third defendant.

[15] The crux of the second defendant's appeal was against that part of the learned judge's decision that held that the first defendant was entitled to continue to be paid a maintenance fee by the second defendant in accordance with the provisions found under two contracts namely, a management agreement dated 21 May 2007, and what was called the first supplemental management agreement dated 27 May 2007.

[16] As learned counsel for the second defendant stated succinctly in his submissions, 'This is PINS' appeal against that part of the decision of the

learned judge, which allowed part of the plaintiff's claim ie that PINS OSC was entitled to a share in the Rental Proceeds from the maintenance and Other Payments received from the Group A as well as Group B Operators for 10 years until 10.07.2015'.

[17] Thus, the subject matter of this appeal is somewhat narrower in its ambit compared to the issues that were in dispute at the trial.

THE MATERIAL BACKGROUND FACTS

[18] On 11 July 2005, the second defendant was granted a Network Facilities Provider licence ('NFP licence') by the Malaysian Communications and Multimedia Commission ('MCMC'). This NFP licence entitled the second defendant to provide network facilities to telecommunication providers. This NFP licence was to be valid for ten years until 10 July 2015.

[19] By way of a letter dated 27 January 2006, the State Government of Perak agreed to appoint the second defendant in respect of a project by the state for the development and building of new telecommunication towers and new broadcasting/broadband in the state, in collaboration with Perak Communication Technology ('the project').

[20] In respect of the project, the second defendant was also required to act as a 'One-Stop Centre' and facilitator for the compliance submission for location and construction of new infrastructures on behalf of the state government and telecommunication providers with state agencies or other relevant authorities.

[21] In contemplation of being awarded a concession by the State Government of Perak for the project in accordance with the letter of 27 January 2006 from the State Government of Perak, the second defendant entered into several contracts with the view to putting in place the structure and manner for its performance of its obligations and to exploit the concession.

[22] On 1 June 2006, the second defendant entered into a licence agreement ('licence agreement') with three companies, 'Operators', who were licensed under the Communications and Multimedia Act 1998 ('CMA'). They were Maxis Broadband Sdn Bhd ('Maxis'), Celcom (Malaysia) Bhd ('Celcom') and DIGI Telecommunications Sdn Bhd ('DIGI').

[23] The primary objective of the licence agreement was for the second defendant to secure land sites and to commission infrastructure projects, at the second defendant's own costs, for the benefit of the operators and other operators. The operators would in turn be licensed to use the Infrastructure for

a specified period of time and upon payment of a licence fee. There were also provisions in the licence agreement for the inclusion of new or other operators. Payment of the licence fee was to be made to the second defendant. Subsequently, there was a supplemental agreement No 1 dated 26 June 2008 which sought to amend, modify and vary the terms of the licence agreement.

[24] To finance the obligations of the second defendant under the licence agreement, a company by the name of PINS Capital Sdn Bhd ('PINS Capital') was established on 24 July 2006. Towards this end, PINS Capital entered into a loan agreement with AmInvestment Group to secure the required financing. PINS Capital was in fact a wholly owned subsidiary of the second defendant.

[25] The second defendant then entered into a shareholders' agreement with the plaintiff dated 21 May 2007 ('shareholders agreement').

[26] This shareholders agreement catered for the establishment of a joint venture company, namely the first defendant, in which the plaintiff and the second defendant were to be equal shareholders.

[27] The intention of this joint venture declared under cl 1.5 of the recital to shareholders agreement was namely:

(a) that the second defendant shall exclusively award the entire construction work of the infrastructures to the first defendant which will in turn award the entire or a portion of the construction work of the infrastructures to its appointed contractors ('the construction services') and the first defendant shall further be appointed as the exclusive management company to manage, lease and receive rental and to carry out the maintenance of the infrastructures in the State of Perak ('the maintenance services') and to undertake the functions of the One Stop Centre services all of which are to be more particularly set out in a management agreement; and

(b) in the event the second defendant is awarded construction projects by other telecommunication providers for the construction of infrastructures in the State of Perak, the second defendant will also award the entire construction work for these projects to the first defendant which will in turn award the construction work for these projects to its appointed contractors.

[28] On the same day, 21 May 2007, the first defendant, the second defendant, the plaintiff and PINS Capital entered into a management agreement ('management agreement').

[29] This management agreement and the terms therein set out carried into effect the intended appointment of the first defendant to perform the construction services, the maintenance services and the One Stop Centre services as contemplated by the shareholders agreement, conditional upon and subject to a concession agreement being entered into between the State Government of Perak and the second defendant.

[30] Six days after the management agreement, on 27th May 2007, the parties to the management agreement entered into an agreement described as the first supplemental management agreement ('first supplemental management agreement'). This first supplemental management agreement was expressed to be supplemental to the management agreement and it was a relatively short agreement that catered for what the first defendant may deduct and retain for itself as its maintenance fee.

[31] With all the background prepared, on 10 July 2007, the second defendant entered into an agreement with the State Government of Perak styled as the concession agreement ('concession agreement'). This event then brought all the preceding agreements into play.

[32] The services required of the second defendant were set out in cl 4.1 of the concession agreement and they were the following services:

(a) to carry out the development and building of Infrastructures in the State of Perak;

(b) to design, build, own, manage, lease and receive rental for, and to carry out the maintenance of, the Infrastructures in the State of Perak Darul Ridzuan;

(c) to carry out functions as a 'One-Stop Centre' and facilitator for the compliance submission for the location and construction of new Infrastructures on behalf of the State Government and telecommunication providers with state agencies or other relevant authorities;

(d) to carry out surveillance of maintenance works including repair and safety audit of Infrastructures;

(e) to maintain and create a database for the collation of data on Infrastructures in the State of Perak Darul Ridzuan for the purpose of information sharing with the State Government.

(collectively, 'the services')

[33] It was against the background of the foregoing agreements that the plaintiff, by its derivative action, sought to claim for the first defendant, inter alia, payment of monies that it alleged the first defendant was entitled to,

resulting in the finding of the learned judge referred to above and part of which in turn, is the subject matter of this appeal.

[34] The second defendant's appeal against the decision of the learned judge, based on the submissions of learned counsel, was broadly premised upon the following contentions:

(a) that there was a fundamental breach of contract by the first defendant; and

(b) that upon a proper construction of the management agreement and the first supplemental agreement, the first defendant was not entitled to part of the payments claimed ie from a particular group of operators referred to by the parties as the 'Group B Operators'.

THE SECOND DEFENDANT'S CONTENTIONS

[35] It was alleged by the second defendant that the first defendant had failed to pay a total sum of RM3,199,904.10 in what are termed as priority payments under the maintenance agreement read with the first supplemental maintenance agreement. These were payments that had to be made to the MCMC.

[36] It was contended that priority payments due to MCMC were of significant importance. This was because the failure to make the payments due to MCMC could result in cancellation of the second defendant's NFP licence which, it was contended, was critical to the agreements the parties had entered into.

[37] It was maintained by learned counsel for the second defendant that having found the first defendant to be in breach of contract, and this was alleged to be a fundamental breach, the learned judge had erred in allowing the first defendant's claim to be entitled to be paid under the management agreement read with the first supplemental management agreement. It was also contended that the first defendant cannot rely on its own breach of contract to recover the payment it sought.

[38] In support of this contention, learned counsel for the second defendant referred to the cases *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1993] 3 CLJ 577 at p 591 and *Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd* [1983] 2 MLJ 317 at p 320. The proposition of law is a well known one. It is that a wrongdoer may not benefit from his own wrong.

[39] It was also contended by learned counsel for the second defendant that the first defendant had further breached its contractual obligation by failing to invoice, bill and collect a total sum of RM4,908,486.67.

[40] It was, in addition, argued by learned counsel for the second defendant that the payment sought on behalf of the first defendant was subject to a condition precedent ie the need first to make the priority payments. Thus, if priority payments were not made, it was contended that the first defendant was not entitled to the payments claimed.

[41] Over and above the foregoing, it was further contended by the second defendant that the first defendant was only entitled to payment out of the revenue from one group of operators namely, what was referred to by the parties as the 'Group A Operators', which consisted of Maxis, Celcom and DIGI. These companies were referred to in the management agreement and first supplemental management agreement as the 'Operators'. It was contended that contrary to what the learned judge had held, as a matter of construction, the first defendant was not entitled to payment out of revenue received from another group of operators referred to as the Group B Operators, which consisted of operators *other than* Maxis, Celcom and DIGI. This position taken by the second defendant was supposed to have been based on a legal opinion given to its Board of Directors.

[42] It should be pointed out that the terms 'Group A Operators' and 'Group B Operators' do not appear in the agreements as such. They were merely terms adopted by the parties to distinguish between the two identifiable group of operators.

[43] Maxis, Celcom and DIGI were referred to by the parties as the 'Group A Operators' while the 'Group B Operators' were the other operators namely YTL Communications Sdn Bhd, Sapura Telecommunications Bhd and Packet One Networks (P1) Sdn Bhd.

[44] By its letter to the first defendant on 3 May 2011, the second defendant stated, inter alia, as follows:

> Dear Sirs
>
> *CESSATION OF PAYMENTS TO PINS OSC & MAINTENANCE SERVICES SDN BHD ('PINS OSC')*
>
> ...
>
> At a recent Board of Directors' meeting of Perak Integrated Network Services Sdn Bhd ('PINS') held on 8 April 2011 the Board noted from its review of a *legal opinion that PINS OSC is not entitled to any of the revenue from telecommunications operators other than Maxis Broadband Sdn Bhd, Celcom (Malaysia) Berhad and DIGI*

Telecommunications Sdn Bhd (collectively 'Group A Operators') under the terms of the management agreement dated 21 May 2007. Telecommunications operators other than Group A Operators include but are not limited to Green Packet, Sapuracrest and YTL, etc. (collectively 'Group B Operators').

It was resolved at the said Board meeting that PINS stop payments to PINS OSC for Group B Operators revenue with immediate effect. It was also resolved that PINS determine the amounts that were paid to PINS OSC to date in respect of Group B Operators revenue and to take the necessary steps to recover the same from PINS OSC.

In line therewith, we are now writing to you, to inform you that PINS has ceased paying PINS OSC for Group B Operators revenue with effect from April 2011 onwards and that PINS will be taking necessary steps to recover any amounts paid by PINS to PINS OSC prior to April 2011 in relation to revenue from Group B Operators

... (Emphasis added.)

THE FIRST DEFENDANT'S ENTITLEMENT TO PAYMENT

[45] It would be logical to first determine what payment the first defendant was entitled to under the management agreement read with the first supplemental management agreement.

[46] Clause 3.1 of the first supplemental management agreement provided as follows wherein the second defendant was referred to as PINS and the first defendant was referred to as the company:

3.1 PINS [2nd Defendant] and the Company [1st Defendant] hereby mutually agree that *after payment of the Priority Payments, the Company shall be entitled to deduct an amount equivalent to 20% of the Rental Proceeds and Other Payments as the maintenance fee* for the maintenance of the Infrastructures by the Company ('the Maintenance Fee') PINS and the Company further agree, that subject to their mutual agreement, the amount of Maintenance fee may be adjusted and varied from time to time as and when the circumstances may justify ('Adjusted Maintenance Fee'). Any balance of the Balance Sum after payment of the Priority Payment and deduction of the Maintenance Fee or Adjusted Maintenance Fee, as the case may be, shall be paid by the Company to PINS ('Remaining Sum'). Notwithstanding the foregoing obligation to pay the Remaining Sum to PINS PINS hereby irrevocably instructs the Company to retain the Remaining Sum in a trust account for purpose of utilization to satisfy future Maintenance Fee or Adjusted Maintenance Fee. (Emphasis added.)

[47] Clause 5.1 of the first supplemental management agreement expressly stated that the first supplemental management agreement is supplemental to the management agreement. It therefore follows that in interpreting the first supplemental management agreement reference and consideration has to be given to the terms in the management agreement.

[48] Based on cl 3.1 above, the maintenance fee that the first defendant was entitled to, after deduction of priority payments, was an amount 'equivalent to *20% of the Rental Proceeds and Other Payments* as the Maintenance Fee for the maintenance of the Infrastructures'. (Emphasis added.)

[49] Clause 2.1.1 of the management agreement provided, inter alia, the following definitions:

> *'Other Payments'* shall mean any other payments whatsoever and howsoever due and payable to PINS by the Operators under the License Agreement other than Rental Proceeds which shall include but not limited to compensation for withdrawal of any Location Criteria Notice; Security Deposit for the due observance and performance by the Operators of the Authorised Work Order, reimbursement for the supply of generators to provide alternative power supply to the Infrastructure and purchase price payable by the Operators for the purchase of the Infrastructure upon termination of the *License Agreement* and shall further include any moneys payable to PINS by the Other Telecommunication Providers;
>
> *'Other Telecommunication Providers'* shall mean any telecommunication providers licensed by MCMC other than the Operators;
>
> *'Rental Proceeds'* shall mean the rental receivable by PINS from the Operators upon the terms and conditions for the License Agreement; (Emphasis added.)

[50] Clause 1.2.1 of the management agreement made specific reference to Maxis, Celcom and DIGI and they were collectively defined as the 'operators'.

[51] It was the learned judge's interpretation of the relevant provisions of the two contracts that the first defendant was entitled to its maintenance fee from both Group A Operators and Group B Operators.

[52] Contrary to the contention of the second defendant, the express terms of the agreements left little if any room for doubt as to the source of the first defendant's maintenance fee. They were expressed under cl 3.1 of the first supplemental management agreement to be from both 'Rental Proceeds' and 'Other Payments'.

[53] 'Rental Proceeds' meant rental from Maxis, Celcom and DIGI, the Group A Operators, receivable by the second defendant.

[54] 'Other Payments' clearly included 'any moneys payable to PINS by 'Other Telecommunication Providers' and which term 'Other Telecommunication Providers' was expressly defined as 'any telecommunication providers licensed by MCMC *other than the Operators*' ... (Emphasis added.)

[55] It was contended that the learned judge had failed to assess cl 3.1 of the first supplemental management agreement against the context of the licence agreement which formed its backdrop or the other agreements that were executed contemporaneously. A

[56] By reference to the recitals to both the management agreement and the first supplemental management agreement, which in turn refers to the licence agreement, it was argued that they limited the provision of maintenance services to only the operators as defined, ie the Group A Operators. The contention was that these recitals disclosed that the appointment of the first defendant was limited to the infrastructure in respect of the Group A Operators. B C

[57] However, this contention overlooks the fact that cl 5A of the licence agreement in fact contemplated the possible participation of operators other than the Group A Operators in respect of these very same infrastructure. Clause 5A provided as follows: D

> 5A. It is mutually agreed that upon *any cellular operator not being a party to this Agreement ('the New Operator') requesting the SBC [2nd Defendant] to grant it a license to use the Infrastructure,* the SBC shall notify the Sharing Operators of such request and procure this consent to the same. The SBC shall not enter into any license agreement with the New Operator without the prior approval of the Sharing Operators to the terms and conditions for the said license agreement PROVIDED THAT the *Sharing Operators shall not unreasonably withhold such approval if the terms and conditions of the said license agreement are similar to this Agreement and the Sharing Operators do not suffer commercial disadvantage or the New Operator does not gain undue commercial advantage over and above the Sharing Operators as a result of the same.* (Emphasis added.) E F

[58] Thus, it was clearly contemplated by the second defendant and Group A Operators that the infrastructure established under the licence agreement could be shared by other operators *upon similar terms.* G

[59] In addition, the 'Other Infrastructures' referred to in the management agreement was defined to mean 'construction project awarded to PINS by Other Telecommunication Providers for the construction of Infrastructures in the State of Perak'. They were thus infrastructures other than those commissioned under the licence agreement by the Group A Operators. H

[60] In the circumstances, that the first defendant should be paid out of revenue from operators other than from Group A Operators in respect of the infrastructures under the licence agreement, certainly cannot be said to be somehow inconsistent or incompatible with the recitals referred to. It also cannot be said to be contrary to commercial sense. I

[61] The licence agreement was subsequently amended and the amendments included the substitution of cl 5A with a new cl 5A. The amendment was by way of a supplemental agreement No 1. This supplemental agreement No 1 was entered into on 26 June 2008, *after* the management agreement and the first supplemental management agreement. Suffice to say that the participation of operators other than Group A Operators continued to be provided for and with greater detail.

[62] References to different provisions in a contract may sometimes obliquely appear to support an alternative construction. A rationale for such an alternative may even be formulated. However, such an attempt may not be permitted to override the express provisions in a contract that are clear and unambiguous, save in circumstances where, for example, inconsistencies arise or where there are conflicting provisions.

[63] As was pointed out by the Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 at pp 491–492; [2016] 1 CLJ 177 at p 204:

> [68] ... *when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of Arnold v Britton And Others*), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 para. 21 that:
>
> > ... *if there are two possible constructions,* the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.
>
> [69] Thus it would appear that even *Arnold v Britton And Others* [2015] UKSC 36 is not totally opposed to the application of business common sense approach in construing a contract, *in the absence of clear words.* (Emphasis added.)

[64] In this case, the learned judge's construction of the terms in issue cannot be faulted. The provisions considered and construed by the learned judge were plain in their expression, leaving very little room for doubt. Therefore, we do not find that the learned judge had erred in holding that the first defendant was entitled to Maintenance Fees to be drawn from payments by both the operators as defined (Group A Operators) and the Other Telecommunication Providers (Group B Operators).

[65] It was also not insignificant that the second defendant never gave any prior indication of a view that the first defendant was not entitled to payment out of revenue from Group B Operators until almost four years after the first supplemental management agreement. Thus, payment out of revenue from Group B Operators was not considered contrary to what the parties had

understood they had agreed to, until the time when a legal opinion was sought and obtained by the second defendant. This then led to the second defendant's letter of 3 May 2011 to the first defendant, giving notice of cessation of payment out of revenue from Group B Operators.

[66] The legal opinion referred to was a written opinion dated 7 April 2011 provided by a local firm of solicitors. In the opinion were disclosed the instructions given and the advice sought. Paragraph 1.4 of the opinion stated as follows:

> 1.4 We have been instructed to advise PINS that in light of the shareholders agreement and Management Agreement whether:
>
> 1.4.1 there is any mechanism, formula or methodology set out in the said agreements in which the amount of fees payable by PINS to the JVCO under the management agreement can be computed or derived; and
>
> 1.4.2 PINS can carry out the activities or scope of work contemplated in the concession agreement with the Group B Operators on its own without referring to the JVCO.

[67] The conclusion given in para 5 of the legal opinion was as follows:

> *5. Conclusion*
>
> 5.1 Subject to the qualifications and assumptions set out above and based solely on our review of the Documents, in our view:
>
> 5.1.1 in the absence of any mechanism, formula or methodology set out in the management agreement for the quantum and manner in which fees are to be paid by PINS to JVCO, it is submitted that the quantum and manner of fees payable is subject to negotiation and further agreement between the parties. Accordingly, where the is no previous agreement on the basis of charging such fees or there are not other provisions specifying how fees are determined and PINS is dissatisfied with the fees, PINS is entitled to seek an explanation or justification from JVCO on the basis in which the fees are determined and the manner in which the invoices have been issued to PINS in the past and the manner in which the invoices will be issued to PINS in the future.
>
> 5.1.2 in relation to the provision of Maintenance Services and OSC Services in respect of Group B Operators, we confirm that PINS may enter into contracts on its own without reference to the JVCO.
>
> 5.1.3 in relation to the provision of Construction Services in respect of the Group B Operators, as the wordings in the management agreement is vague and the intent and its effect at best is ambiguous, it is unclear as to whether there is any binding obligation on the part of PINS to award the Construction Services involving the Group B Operators to the JVCO.

[68] As can be seen, there was no opinion given as to what payments the first defendant was entitled to under the management agreement read with the first supplemental management agreement.

[69] The reason for this was not bewildering. The solicitors who gave the legal opinion was never provided with a copy of the first supplemental management agreement, even though at the time the opinion was given, the first supplemental management agreement had been in existence for almost four years. One may be forgiven for inferring from this that something was clearly amiss.

WAS THE FIRST DEFENDANT DISENTITLED TO ITS MAINTENANCE FEE?

[70] Pursuant to cl 4.1 of the management agreement, the first defendant undertook with the second defendant and the plaintiff that it shall make certain payments referred to as 'Priority Payments'.

[71] These priority payments were set out under cl 4.1 of the management agreement and they were as follows:

(a) rental to landowners for land rented by the second defendant pursuant to tenancy agreements;

(b) yearly obligations to the MCMC; and

(c) any other payments to relevant authorities inclusive of any penalties imposed by the relevant authorities or parties.

[72] It was found as a fact by the learned judge that the first defendant had failed to pay a total sum of RM3,199,904.10 in respect of what were termed as priority payments under the maintenance agreement.

[73] The first defendant was therefore found to have breached a term in the management agreement.

[74] Because of its failure to pay MCMC, the first defendant was charged under s 242, the general penalty provision, of the CMA.

[75] The offence was compounded resulting in the imposition of a total fine of RM25,000. The fine was paid by the second defendant. The RM3,199,904.10 due to MCMC was also paid by the second defendant.

[76] Hence the second defendants counterclaim for a total sum of RM3,224,904.10 against the first defendant and which counterclaim was allowed by the learned judge.

[77] In addition, the second defendant maintained that the first defendant was also in breach of the management agreement by failing to render invoices, bills and to collect payment from the operators.

[78] Contrary to this contention, the learned judge referred to cl 6.1.1 (vii) of the management agreement and found that it was the second defendant's obligation to collect payment from the operators.

[79] Clause 6.1.1 (vii) of the management agreement provided as follows:

> 6.1 PINS' COVENANTS
>
> 6.1.1 PINS hereby covenant with the Company as follows:
>
> (i) ...
>
> ...
>
> (vii) to ensure that the Rental Proceeds and Other Payments from the Operators are paid directly to PINS Capital in accordance with the terms contained in the Notice cum Instruction and in the event PINS shall receive such Rental Proceeds and Other Payments from the Operators, PINS shall forthwith pay over the Rental Proceeds and Other Payments to PINS Capital and until so paid, PINS shall hold such proceeds in trust for PINS Capital;

[80] Having regard to the forgoing provisions, there was no reason to disagree with the learned judge's conclusion that it was the obligation of the second defendant, not the first defendant, to take steps to collect the rental proceeds and other payments from the operators.

[81] The learned judge held as follows:

> 37. I have carefully perused the management agreement and it is observed that Clause 6.1.1 (vii) expressly provides that the second defendant covenant with the first defendant inter alia to ensure that the Rental Proceeds and Other Payments are paid directly to PINS Capital.
>
> 38. Since it is the second defendant's obligation to make payment directly to PINS Capital, in the absence of any express provision which provides the contrary, it can be implied that it would be the second defendant's obligation to collect payment from the Operators.

[82] Clause 5 of the licence agreement catered for payments to be made by

A the operators to the second defendant. Clause 5.1 provided, inter alia, that, 'The Sharing Operators shall pay the SBC (second defendant) the applicable Licence Fee for each Infrastructure as set out in Schedule 8 commencing from the Handover Date'. Clause 5.4 provided that 'All invoices for payment shall be submitted in triplicate by the SBC and shall be accompanied by any supporting B documentation as may be required by the Sharing Operators substantiating the charges set forth in the invoices'.

[83] Therefore, under the licence agreement, to which the first defendant C was not a party, invoicing and collecting payment from the operators were tasks that were obviously to be undertaken by the second defendant. If those tasks were not clearly or adequately passed or contracted out to the first defendant, they would therefore remain tasks that the second defendant had to undertake.

D **[84]** What is equally important is, even if the first defendant had been in breach of contract as alleged, it does not follow ipso facto that its right to payment under the first supplemental management agreement would somehow be automatically negated or forfeited, without more.

E **[85]** As was pointed out by this court in *LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor* [2007] 4 MLJ 1 at p 11; [2007] 2 CLJ 434 at p 448, in the judgment of Gopal Sri Ram JCA as His Lordship then was:

> When giving judgment, Abdul Malek J (as he then was) referred to *Mayson v Clouet & Anor* where Lord Dunedin said this:
>
> F
>
> > If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end, that is, no longer binding on him — while retaining the right to sue for damages in respect of the breach committed.

G

[86] In respect of the first defendant's breach of contract, the second defendant may have a right to sue for damages suffered or terminate the contract, if the term breached is fundamental or the term may be regarded as a H condition as opposed to a warranty, as it is sometimes described.

[87] There was no termination of the maintenance agreement, as amended by the first supplemental management agreement, by the first defendant. In fact, such was never its pleaded case.

I

[88] Nowhere in the second defendant's defence and counterclaim was it pleaded that the maintenance Agreement and/or the first supplemental management agreement was terminated. Needless to say, as is trite, the second defendant must be taken to be bound by its pleadings (see *Saiman bin Umar v*

Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492; [2015] 9 CLJ 153 and see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1; [2012] 3 CLJ 551; [2012] 3 MLRA 459 and *Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd* [2009] 5 MLJ 243; [2009] 1 LNS 296).

[89] Indeed, there was no evidence that the second defendant had given any notice accepting the first defendant's breaches of contract as repudiatory breaches and giving notice of termination.

[90] Without terminating the maintenance agreement and/or the first supplemental management agreement, the second defendant had contended and pleaded, in para 18 of its defence and counterclaim, that simply by reason of the first defendant's breaches of contract the first defendant was disentitled to its claim for payment.

[91] As is often said, two wrongs do not make a right. It does not follow that merely because a term in a contract is breached, the innocent party would be justified in denying the other party its rights found in another provision in the contract.

[92] Unless there was an agreed term for such a consequence, having regard to the principle as described in *LSSC Development Sdn Bhd,* the second defendant's contention does not accord with the law. The fact that the second defendant is presented at law with an option, whether to continue with the contract or to treat it as terminated by reason of a fundamental breach of contract in itself, presents the requirement of an election by the second defendant.

[93] As the learned author of the 16th Edition of *Cheshire, Fifoot and Furmston's Law of Contract,* stated plainly at p 684:

> If the innocent party elects to treat the contract as discharged, he must make his decision known to the party in default. Once he has done this, his election is final and cannot be retracted. The effect is to terminate the contract for the future as from the moment when the acceptance is communicated to the party in default.

[94] Without terminating the maintenance agreement and the first supplemental management agreement, evidence was led that the second defendant took over and assumed the functions of the first defendant. The books and accounts were taken by the second defendant such that it rendered the first defendant unable to function.

[95] The contention that the second defendant took over the functions of the first defendant was not denied. In the written submissions of learned counsel for the second defendant, and as a consequence of the breaches of contract of the first defendant, it was submitted as follows:

> 25. It was this dire situation, brought about by the disregard and failure by PINS OSC [1st Defendant] of its primary duties and obligations, that caused PINS [2nd Defendant] to treat PINS OSC's breach as a fundamental breach and to take over the management functions from PINS OSC.

[96] In the witness statement of one Zadey Che Wan bin Abdullah Fadzil, a director of the second defendant at the material time and a witness for the second defendant, the witness testified as follows:

> A33. ... Eventually however, *on or about February to March 2011,* the 1st Defendant completely stopped carrying out any of its obligations and works under the management agreement and/or the First Supplemental Agreement and these works have since been carried out by the second defendant. (Emphasis added.)

[97] On this issue and as a finding of fact, the learned judge held as follows:

> 36. The plaintiff further submitted that the second defendant and the third defendant had deprived the first defendant of funds to sustain operations subsequent to 3.5.2011, resulting in the first defendant being unable to maintain the 87 towers. In relation to this point, the plaintiff alleged that the second defendant without notice or without issuing letter of termination of the management agreement proceeded to take over the functions of the first defendant to perform the Construction Services, Maintenance Services & OSC Services under the management agreement.
>
> ...
>
> 41. In these circumstances it appears that the second defendant and the third defendant has deprived the first defendant of funds to sustain operations after 3.5.2011, resulting in the first defendant being unable to maintain the 87 towers.
>
> 42. In fact, DW1 admitted in cross-examination that in May 2011, the second defendant took over the functions of the first defendant to perform the Construction Services, Maintenance Services & OSC Services under the management agreement.

[98] Could the second defendant usurp the contractual functions of the first defendant without terminating the management agreement and the first supplemental management agreement and to practically oust the first defendant from those contracts? We think not.

[99] Until terminated, the management agreement and the first supplemental management agreement remained in force. That the second

defendant's conduct could be regarded as tantamount to acceptance of the first defendant's breaches as repudiation and thus termination of the agreements, was not the second defendant's pleaded case. As mentioned, it was not the pleaded case for the second defendant that these agreements were terminated either by its actions or otherwise.

[100] Contrary to what was also contended by the second defendant, the first defendant's entitlement to payment under cl 3.1 of the first supplemental management agreement was not made conditional upon making of the priority payments.

[101] What was set out in cl 3.1 was the formulation of how and against what amount is the 20% to be applied to determine the amount that may be deducted by the first defendant as maintenance fee.

[102] Making the priority payments was not, in our view, made a condition precedent to the first defendant's entitlement to payment of its maintenance fee. Clause 3.1, cannot be read such that the first defendant would not be entitled to its maintenance fee should there be a failure to make any priority payment.

[103] What this means is if there was a breach, and the second defendant suffers damage by reason thereof, it would be entitled to sue for compensation for the damage suffered or even try to terminate the management agreement and the first supplemental management agreement.

[104] Instead, what happened in this case was, rather than terminating, the second defendant elected to claim compensation for the first defendant's breach. This was manifested by the second defendant's counterclaim for the payments it made to MCMC, being the unpaid priority payments, and the fine it paid on behalf of the first defendant, both of which were allowed by the learned judge.

[105] We therefore found that the learned judge had not erred in coming to her decision and in the consequential orders made.

CONCLUSION

[106] For the reasons and upon the grounds given, the second defendant's appeal was dismissed with costs and the decision of the learned judge given on 26 September

Appeals dismissed.

Reported by Ashok Kumar